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VALIDITY AND EFFECTS OF CONTRACTS IN THE CONFLICT OF LAWS.*

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II

LAW GOVERNING THE INTRINSIC VALIDITY OF CONTRACTS

Notwithstanding the above array of authorities, both continental and Anglo-American, in support of the intention theory, it is open to serious criticism, so far as it is applied to the intrinsic validity of contracts.

"Wide as the operation necessarily is which is given to the *intention* of the parties to a contract," says Foote,[88] "it is plain that it can have no effect upon the question of the legality or illegality of the thing contracted for. No law can permit itself to be evaded, nor can it, consistently with the principles of international jurisprudence, sanction the evasion of a foreign law. Thus, if the thing contracted to be done is illegal by the law of the place of the intended performance, the contract should be held void, wherever it was actually entered into, by all courts alike."

Foote concludes, therefore, that the legality of a contract depends generally upon the law of the place of intended performance, but that the legality of the making of the agreement, i. e., giving a particular consideration for a particular promise, is controlled by the *lex loci actus*.[89]

Professor Minor also rejects the intention theory in its application to the validity of contracts. He would determine everything relating to the *validity* of the contract by the law of the place where it is made;

* Continued from the April number, 30 YALE LAW JOURNAL, 565.

[88] Foote, *Private International Jurisprudence* (4th ed., 1914.), 358-359.

[89] Foote, *op. cit.*, 359-363.

everything relating to the *performance* of the contract, by the law of the place of performance; and the legality or sufficiency of the *consideration,* by the law of the situs of the consideration.[90]

The most vigorous opponent of the intention theory is Professor Beale.[91]

"The fundamental objection to this," he says, "in point of theory, is that it involves permission to the parties to do a legislative act. It practically makes a legislative body of any two persons who choose to get together and contract. The adoption of a rule to determine which of several systems of law shall govern a given transaction is in itself an act of the law."

Professor Dicey admits the force of the criticism just stated, but, seeks, nevertheless, to justify the intention theory. In Rule 151 he summarizes what he conceives to be the English law on the subject as follows: "The essential validity of a contract is (subject to the excep-"tions hereinafter mentioned) governed indirectly by the proper law of "the contract." By the proper law of the contract Dicey means "the "law or laws by which the parties to a contract intended, or may "fairly be presumed to have intended, the contract to be governed; or "(in other words) the law or laws to which the parties intended, or may "fairly be presumed to have intended, to submit themselves."

"This theory," says Dicey,[92] "is consistent not only with the language of English judges, but, what is of more consequence, with their mode of thought. They hold that a contract is governed by the law of the country with which it has the most substantial connection, or, to put the matter shortly, to which it belongs, i. e., that an English contract is governed by English law, an American contract by American law, and so forth. But when we ask what is the circumstance which in the main determines what is the country to which a contract belongs, we find that it is the intention of the parties, or, in other words, we are brought round again to the conclusion that the essential validity of a contract is in the main determined by the proper law thereof. We can now see what is the real meaning of English judges when they decline, as they often most rightly do, to be bound by any hard and fast rule as to the law governing the construction or validity of a contract. They do not intend to question the principle that a contract is governed by the law or laws to which the parties intended to submit themselves, but do intend to express the perfectly sound doctrine that in ascertaining what this intended law is, a Court ought to take into account every circumstance of the case, and ought not to be tied down to any rigid presumption that the parties must have intended to be bound by a particular law, whether it be the *lex loci celebrationis,* or the *lex loci solutionis*. . .

"The proper law of a contract, it may be objected, is the law chosen by the parties and intended by them to govern the contract. If, then, it may be argued, the proper law of a contract determines its essential

[90] Minor, *Conflict of Laws* (1901) 401-402.
[91] (1910) 23 HARV. L. REV. 260.
[92] *Conflict of Laws* (2d ed. 1908) 817-821.

validity, the legality of an agreement depends upon the will or choice of the parties thereto; but this conclusion is absurd, for the very meaning of an agreement or promise being invalid is that it is an agreement or promise which, whatever the intention of the parties, the law will not enforce; the statement, for example, that under the law of England a promise made without a consideration is void, means neither more nor less than that the law will not enforce such a promise even though the parties intend to be legally bound by it, and this state of things cannot be altered by the fact that Englishmen contracting in England intend, and even in so many words express their intention, that a promise made by one of them, X, to the other A, shall, though made without a consideration, be governed by the law of a foreign country, and therefore be valid. . .

"The reply to this objection is that its force depends on a misunderstanding of the principle contended for. No one can maintain that persons who really contract under one law can by any device whatever render valid an agreement which that law treats as void or voidable. What is contended for is that the *bona fide* intention of the parties is the main element in determining what is the law under which they contract. To put the same assertion in another form, an English contract is governed by English law, a French contract is governed by French law; but when, say, an Englishman and a Frenchman, or two Englishmen, enter in England into a contract to be wholly or partly performed in France, their *bona fide* intention is, at any rate, the chief element in determining whether the contract is an English contract or a French contract. No doubt, in deciding this matter, the Court must regard the whole circumstances of the case. As regards the interpretation of the contract, the expressed intention is decisive; as regards its essential validity or legality, this is not quite so certainly the case. If it is clear they meant to contract under one law, e. g. the law of England, no declaration of intention to contract under another law so as to give validity to the contract will avail them anything. But this result follows because in the view of the Court, their real intention was to enter into an English contract.

"If this one solid objection to our theory be removed, the doctrine that, according, at any rate, to the view of English judges, the essential validity of a contract is determined by its proper law is, it is submitted, made out. It will be noted that in Rule 151, the statement is made that the essential validity of a contract is governed 'indirectly' by its proper law. The word 'indirectly' is inserted for the very purpose of showing that the parties cannot directly determine by their choice whether a contract shall be legal or not. What they can do is to determine what is the law under which they in fact contract, and the rules of this law, i. e., the proper law, will, subject, however, to wide exceptions, determine whether a contract is essentially valid or invalid."

In regard to this explanation Professor Beale makes the following observations:[93]

"It is certainly not theoretically impossible," he says, " to assign a contract to some one state as the seat of the obligation and to have it governed by the law of that state. Some such suggestion has already been made by the author as solving the difficult question of what law governs a trust of chattels created *inter vivos*. This suggestion was

[93] (1910) 23 HARV. L. REV. 263.

made, however, not as to the creation of a trust, but as to its administration after it had been validly created. Before such a principle can come into force it is necessary to have a trust validly created. In the same way some such doctrine might well be accepted to govern the performance of a contract once validly created; but it is still necessary to get the obligation created, and until that it done the parties are hardly in a position to discuss the seat of its performance. The ingenious suggestion does not at all relieve us of the necessity of admitting, if we accept any rule giving effect to the intention of the parties, that we allow the parties by their own will to create an obligation, where, by the law of the place under which they act, no legal obligation would be attached to the agreement."

So far as it applies to the validity of contracts the intention theory does not admit of a theoretic defence. The validity or invalidity of a legal transaction should result from fixed rules of law which are binding upon the parties. Allowing the parties to choose their law in this regard involves a delegation of sovereign power to private individuals. Dicey's explanation of the intention theory does not meet this objection. If the parties to a contract which is made in England and is to be performed in France can, by the mere operation of their will, make it a French contract or an English contract, which is subject, as regards intrinsic validity, to French or English law, respectively, they are in fact determining the validity of the contract, and to that extent exercising sovereign powers. This is true though they may be restricted in their choice to the law of the states with which the contract has a substantial connection.

The writer rejects, however, the implication contained in the above quotation from Professor Beale that the law of the place where a contract is made necessarily determines its intrinsic validity.

The intention theory has been adopted so widely as the fundamental basis for the solution of the conflict of laws with respect to contracts, notwithstanding the theoretic objection mentioned, because it possesses certain practical advantages over the other rules that have been so far proposed. It can be overthrown, therefore, only if some substitute can be discovered which will possess the same practical advantages as the intention theory, without being open at the same time to the theoretic objection referred to. With this object in view let us examine briefly the different rules that have been suggested for the solution of the problem before us.

1. *View that the law of the place of contracting should determine the intrinsic validity of contracts.* In support of the *lex loci* the theory of a voluntary submission has been frequently advanced, but this is a mere fiction in the absence of a declaration of intention to that effect.[94]

[94] See 1 Aubry et Rau, *Cours de droit civil français* (5th ed. 1897) 163; Diena, *Principi di diritto internazionale* (1910) 245; 1 Foelix, *Traité de droit international privé* (4th ed. 1866) 223; Niemeyer, *Vorschläge und Materialien* (1895) 242; (1898) 3 DEUTSCHE JURISTENZEITUNG, 372; Pillet, *Principes,* 440; Valery, *Manuel de droit international privé* (1914) 979-980.

Professor Beale contends that the law of the place of contracting has the exclusive power to create a contract, by reason of the territorial sovereignty of each state.

"If the law of the place where the parties act refuses legal validity to their acts it is impossible to see on what principle some other law may nevertheless give their acts validity. The law of the place of performance can have no effect as law in another place, namely, the place where the parties act; for it is a fundamental doctrine of our law that 'the laws of every state affect and bind directly . . . all contracts 'made, and acts done within it. A state may therefore regulate . . . the 'validity of contracts and other acts done within it; the resulting 'rights and duties growing out of these contracts and acts.' Any attempt to make the law of the place of performance govern the act of contracting is an attempt to give to that law extraterritorial effect."[95]

"In all these cases the matter must, it seems, be determined theoretically by the law governing the transaction, i. e., the law of the place where the parties act in making their agreement. If by the law their acts have no legal efficacy, then no other state can give them greater effect. If by the law of that state their acts created a binding obligation upon the parties, then the parties who have acted under that law must be bound by it."[96]

"The question whether a contract is valid, that is, whether to the agreement of the parties the law has annexed an obligation to perform its terms, can on general principles be determined by no other law than that which applies to the acts, that is, by the law of the place of contracting. If the law at that place annexes an obligation to the acts of the parties, the promisee has a legal right which no other law has power to take away except as a result of new acts which change it. If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so. . .

"This doctrine gives full scope to the territoriality of law, and enables each sovereign to regulate acts of agreement done in his own territory."[97]

Professor Minor[98] appears to share in general Professor Beale's views, although he does not deduce therefrom the same conclusions as the latter regarding the intrinsic validity of contracts. The Supreme Court of the United States also has adopted the same theory with respect

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[95] (1910) 23 HARV. L. REV. 267.

[96] *Id.*, 268.

[97] *Id.*, 270-271.

[98] "The only law that can operate to *create* a contract is the law of the place where the contract is entered into (*lex celebrationis*). If the parties enter into an agreement in a particular state, the law of that state alone can determine whether a contract has been made. If by the law of the state *no* contract has been made, there is no contract. Hence, if by the *lex celebrationis* the parties are incapable of making a binding contract, there is *no* contract upon which the law of any other state can operate. It is void *ab initio*." *Conflict of Laws* (1901) 410.

to the legislative power of the individual states[99] and, of late, with respect to torts in general.[1]

The doctrine of the territoriality of law is fundamental in Anglo-American law, but the consequences deduced therefrom, so far as the conflict of laws is concerned, are often misleading, and not infrequently erroneous. Story himself is not free from criticism in this respect. He says:[2]

"The first and most general maxim or proposition is that which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory.

"The direct consequence of this rule is, that the laws of every state affect and bind all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it."

What does Story mean when he says that the laws of every state affect all contracts made within it? The statement would seem to imply that all contracts executed in the state of X are subject to the rules governing contracts in that state, but that cannot be Story's meaning, for in a later section he makes it perfectly plain that if the place of performance is in the state of Y the laws of the state of Y will control. The maxim furnishes therefore no rule for the solution of the conflict of laws.

Story's second maxim is equally ambiguous.

"Another maxim or proposition is that no state or nation can by its laws directly affect or bind property out of its territory, or bind persons not resident therein, whether they are natural-born subjects or others. This a natural consequence of the first proposition."[3]

If this maxim is intended to state only that the sovereign state of X cannot compel the sovereign state of Y to enforce laws enacted by the state of X or to recognize the private rights thereby created, the statement is obviously true, but of no help in solving the problems of the conflict of laws. Should the meaning of the passage be, on the other hand, that the state of Y will recognize the rights created by the state of X so far as they fall within the legislative limits laid down by the first maxim, but not if the legislation transcended those limits, the generalization is entirely too broad. The recognition or non-recogni-

[99] *Equitable Life Assur. Soc. v. Clements* (1891) 140 U. S. 226, 11 Sup. Ct. 822; *New York Life Ins. Co. v. Head* (1914) 234 U. S. 149, 34 Sup. Ct. 879; *New York Life Ins. Co. v. Dodge* (1918) 246 U. S. 357, 38 Sup. Ct. 337; cf. *Am. Fire Ins. Co. v. King Lumber Co.* (1919) 250 U. S. 2, 39 Sup. Ct. 431. A stipulation that the law of another state shall govern will be ineffective if inconsistent with the law of the state where the contract was made. *Mut. Life Ins. Co. v. Hill* (1904) 193 U. S. 551, 24 Sup. Ct. 538; *Supreme Lodge v. Meyer* (1905) 198 U. S. 508, 25 Sup. Ct. 754.

[1] *Slater v. Mexican Nat. Ry.* (1904) 194 U. S. 120, 24 Sup. Ct. 581; *Western Union Tel. Co. v. Brown* (1914) 234 U. S. 542, 34 Sup. Ct. 955; *Spokane Inland Ry. v. Whitley* (1915) 237 U. S. 487, 35 Sup. Ct. 655.

[2] *Conflict of Laws* (8th ed. 1883) 21. [3] *Id.*, 22.

tion of the rights in question would depend upon the rules of the conflict of laws existing in the state of Y, which might reject in large measure the claims of the *lex loci.* If the above maxim has reference to the effect of such legislation in the state of X and be intended to convey the thought that the state of X has no power, so far as its own organs are concerned, to create rights based upon acts occurring in the state of Y, it is absolutely erroneous. Story himself admits that a contract made in the state of Y but to be performed in the state of X would be subject to the law of the state of X. Professor Beale holds, consistently with his fundamental theory, that the law of the place of contracting governs the validity of contracts, irrespective of the law of the place of performance. "If the law of the place where the agree-"ment is made," he says,[4] "annexes no legal obligation to it, there is "no other law which has the power to do so." It may be properly asked, however, who conferred such exclusive power upon the state where the contract was made? Such power was certainly not conferred by a common superior having power to define and to limit the legislative and judicial power of the various states, for no such superior exists as yet. The power must be derived therefore from agreement; but no such agreement, even in a tacit form, can be shown to exist. No common usage nor rule of international law defining the legislative and judicial power of nations in the matter of the conflict of laws has so far been developed.[5] The power of each state to create private rights is, so far as its own organs are concerned, necessarily unrestricted.[6] A sovereign state has in the very nature of things the power to attach any legal consequences whatever to any state of facts whatever, including acts in other countries, even by persons not citizens or residents of the former. The conditions under which it will do so are determined, on grounds of policy, by each sovereign himself. As regards this country these conditions are prescribed by the Supreme Court of the United States so far as the question falls within the provisions of the federal Constitution; in other respects the individual states are free to adopt such rules of the conflict of laws as they may deem best.

The writer has discussed this question in another place where he says in part:

"Notwithstanding these statements by such eminent authorities, it is submitted that while the theory that a particular territorial law is exclusively applicable to a particular set of operative facts may be established in this country as a matter of constitutional law, it cannot be accepted analytically as a sound basis for the conflict of laws. Where all the operative facts occur in a single state it may be conceded that *as a matter of expediency* the rights of the parties should be

[4] (1910) 23 HARV. L. REV. 271.

[5] Concerning the relationship between international law and the conflict of laws see (1920) 20 COL. L. REV. 269-270, 278-279.

[6] *Id.*, 272-280.

determined ordinarily in accordance with the law of such state. But if the forum sees fit, it may adopt another rule. Where the operative facts occur in or affect more than one state, there is much greater difficulty in selecting the governing rule. Generally speaking, Anglo-American law will incorporate the law of some particular foreign state. It will select at times the law of the place where the act was done or was to be performed; at other times, the law of the situs of the property and not of the place of acting; at other times still it will choose neither the law of the place of acting nor that of the situs of the property but the law of the domicil. Where a contract is entered into through an agent, it will bind the principal in accordance with the law of the place where the agent acts, although the principal was never in the latter state and he had no capacity under the law of the state in which he was domiciled and in which he appointed the agent. Sometimes a legal transaction will be sustained if it conforms to the law of one of several states.

"That there is *no logical necessity* for the application of any particular rule selected by Anglo-American law is seen from the fact that different rules with respect to the same set of facts often prevail in foreign countries. Nor can our rules of the conflict of laws be explained by any theory of 'territoriality' other than the general doctrine that the law of the forum selects the rules which shall control. In fact, the only answer that can be given to the question why the common law has chosen a particular rule to govern in the conflict of laws or in any other branch of law is that it has seemed to the forum sound policy to do so. . .[7]

"As long as the Anglo-American notion of law is based upon the existence of physical force on the part of organized society, all legal relations, including rights, duties, privileges, no-rights, powers, liabilities, immunities and disabilities must necessarily have reference to some particular territorial law. Each organized society, by virtue of its existence as a sovereign, is obliged to define for itself what rights, duties, privileges, etc. shall attach to the operative facts which may be presented for determination to its judicial or executive agents, without directions or suggestions from the organized society within whose territory those facts may have occurred. Whether the operative facts happened wholly within its territory or partly or wholly without such territory cannot make any difference. 'Rights' being the correlatives of 'duties,' for the non-performance of which organized society will inflict disagreeable consequences upon the person owing the duties, it is impossible, of course, to recognize that a party has a legal right in a given state if there are no remedies available in such state for its enforcement."[8]

Professor Beale seems to think that Lord Mansfield, Story, and practically all the English and American judges who have applied the intention theory or some rule other than the *lex loci* in the determination of the validity of contracts have been misled into accepting the continental theory of law.[9] This assumption is, however, without foundation. The truth of the matter is rather, that the law of the place

[7] *Id.*, 274.
[8] *Id.*, 276-277.
[9] See (1909) 23 HARV. L. REV. 7.

of contracting appeared to furnish too narrow a basis for the solution of the conflict of laws and was rejected for that reason as an exclusive rule governing the intrinsic validity of contracts.

Let us consider now the advantages and disadvantages of the *lex loci*. From a practical point of view the chief advantage of the *lex loci* over any other rule is its simplicity. Even as regards contracts by correspondence the application of this rule presents less difficulty than that of the debtor's domicil or that of the place of performance. It is urged also that the *lex loci* is the only rule that can successfully cope with the vexed question of bilateral contracts, inasmuch as it necessarily leads to the application of one law in the determination of the rights and duties of the parties. Another argument urged in favor of the law of the place of contracting is the fact that it is the only law which both parties can ascertain with equal facility. With respect to contracts *inter praesentes* this contention is sound. The *lex loci* is in those cases the only law with respect to which both parties can get expert advice,[10] for a lawyer has technical knowledge only of the law of the state or country in which he is practicing.

The chief objection raised against the law of the place of contracting is that it is "accidental, transitory, foreign to the substance of the "obligation."[11] This is especially true in contracts concluded by correspondence, which constitute perhaps the majority of the cases arising in the conflict of laws.[12] In these cases the *lex loci* may be wholly accidental, and the assumption that both parties can get with equal facility expert legal advice is without foundation. The place of contracting is not known in these cases until the negotiations are completed, and even if it could be known beforehand, it would be a foreign law to at least one of the contracting parties. The place of contracting is dependent in these cases upon positive rules of law which vary considerably in the different countries.[13] In this country it is determined by the last act that was necessary to make it a binding contract. If, for example, the negotiations are carried on between parties in Connecticut and in New York, and the final letter happens to be posted in New Jersey, it would be a New Jersey contract, and subject to New Jersey law. The validity of the contract would thus be determined by a

[10] *Id.*, 271-272.

[11] Savigny, *Private International Law* (Guthrie's transl. 1880) 198.

[12] Many continental writers contend therefore that contracts by correspondence should be governed by the law of the domicil of the offeror, by the law which will postpone the formation of the contract longest, or by some other law. Bartin, (1897) 24 CLUNET, 476; *Etudes de droit international privé* (1899) 44-45; Chrétien, (1891) 18 CLUNET, 1028; Dreyfus, *L'acte juridique en droit international privé* (1904) 363. In favor of the national law of the offeror Cass. Turin (Jan. 31, 1891), (1891) 18 CLUNET, 1026.

[13] In Belgium, Italy, Roumania, Russia and other countries the contract is not deemed completed until the letter of acceptance reaches the offeror. (1920) 20 COL. L. REV. 252, notes 31-35.

law which had no other connection with the contract than the accidental mailing of the letter of acceptance in that state.

2. *View that the law of the place of performance should control.* The view that the law of the place of performance should control the validity and effects of contracts is due in this country, as was shown in a previous article, to the influence of Lord Mansfield's dictum in *Robinson v. Bland.*[14] This dictum was accepted by the early American cases and was reinforced by Story in his celebrated treatise on the conflict of laws. Story states that the application of the law of the place of performance results from "natural justice,"[15] and he relies in support of his conclusion upon passages from the Roman law, upon certain of the old continental writers, upon Lord Mansfield's dictum, and upon the American cases that adopted this dictum. So far as the authorities cited by Story bear out his contention,[16] they will be found to be based principally upon a passage in the Corpus Juris Civilis: *"Contraxisse unusquisque in eo loco intellegitur, in quo ut solveret, se obligavit."*[17] Story cites this passage. The foreign writers referred to by Story base their conclusion largely upon this passage, as did also Huber, whose views were adopted by Lord Mansfield. The great Romanist, Wächter, has shown, however, that the provision of the Roman law relied upon cannot be accepted in a literal way, and that it may express only the Roman law relating to the jurisdiction of courts.[18]

Savigny relied upon the above passage of the Roman law to support the application of the law of the place of performance, but he sought to justify it also on principle.

He contended that a contract has its "seat" at the place where it is to be performed. The place of contracting was in his opinion accidental, transitory, and foreign to the substance of the obligation and to its further development and effect, whereas the whole expectation of the parties is directed to performance. He concluded therefrom that unless the parties have expressed their intention to be governed by some other law, they must be deemed to have contracted with reference to the law of the place of performance.[19] Where there is no evidence

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[14] (1760, K. B.) 2 Burr. 1077.

[15] *Op. cit.* note 2, at p. 376.

[16] See Lorenzen, *Conflict of Laws Relating to Bills and Notes* (1919) 111-119.

[17] *Digest,* XLIV, 7, 21.

[18] (1842) 25 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS, 42-43.

[19] "In every obligation, then, we find principally and uniformly two visible phenomena which we might take as our guides. Every obligation arises out of visible facts; every obligation is also fulfilled by visible facts; both of these must happen at one place or another. We can, therefore, select either the place where the obligation has originated, or the place where it is fulfilled, as determining its seat and its forum—either the beginning or the end of the obligation. To which of the two points shall we give the preference upon general principles?

showing an actual intention of the parties, this assumption is of course a mere fiction.

The arguments advanced by Savigny in favor of the law of the place of performance are unquestionably very weighty, and are especially so where the place of performance is not in doubt.[20] The rule is certain and easy of application and is based upon an internal, instead of an external or casual relationship between the contract and the governing law. Where the place of performance is not fixed, however, the *lex loci solutionis* is less certain that the *lex loci.* In these cases difficult questions of fact concerning the place of performance may arise.[21] Where the making of the contract is prohibited by a distinct local policy, such as is involved in legislation forbidding the execution of contracts on Sunday, it is apparent that the law of the place of performance cannot reasonably control.[22] The Supreme Court of Wisconsin[23] was clearly in error when it denied the validity of a note which had been executed and delivered on Sunday in New York, under the law of which it was valid, because it was payable in Massachusetts, where all executory agreements for the payment of money, including bonds and promissory notes, made and delivered on Sunday were void as between the parties. The Massachusetts statute had obviously exclusive reference to the execution of notes in Massachusetts and

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"Not to the origin. This is in itself accidental, transitory, foreign to the substance of the obligation and to its further development and efficacy. If in the eyes of the parties a permanent influence reaching into the future were to be ascribed to the place where the obligation arose, this certainly could not flow from the mere constituent act, but only from the connection of that act with extrinsic circumstances, by which a definite expectation of the parties was directed to that place.

"The case is quite different with respect to the fulfilment, which is indeed the very essence of the obligation. For the obligation consists just in this, that something which was previously in the free choice of a person, is now changed into something necessary,—that which was hitherto uncertain, into a certainty; and when this necessary and certain thing has come to pass, that is just the fulfilment. To this, therefore, the whole expectation of the parties is directed; and it is therefore part of the essence of the obligation that the place of fulfilment is conceived of as the seat of the obligation, that the special forum of the obligation is fixed at this place by voluntary submission." Savigny, *op. cit.* note 11, 198-199.

[20] Many eminent writers have accepted Savigny's view. 1 Dernburg, *Pandekten* (7th ed. 1902) 106; 1 *Lehrbuch des bürgerlichen Rechts* (3rd ed. 1906) 111; Barazetti, *Das internationale Privatrecht im bürgerlichen Gesetzbuche für das deutsche Reich* (1897) 55; 1 Endemann, *Lehrbuch des bürgerlichen Rechts* (9th ed. 1903) 97; 1 Gerber, *System des deutschen Privatrechts* (17th ed. 1895) 41; 1 Gierke, *Deutsches Privatrecht* (1895) 232, notes 65 and 66.

[21] Story, *op. cit.* 381 ff.; Minor, *op. cit.*, 377-380. In some countries the place of performance is, under these circumstances, fixed by law. This is, according to Niemeyer, a very complicated legal term. *Op. cit.* note 94, at p. 241.

[22] *Arbuckle v. Reaume* (1893) 96 Mich. 243, 55 N. W. 808; *Brown v. Browning* (1886) 15 R. I. 422, 7 Atl. 403.

[23] *Brown v. Gates* (1903) 120 Wis. 349, 97 N. W. 221.

did not intend to prescribe a Sunday policy for the state of New York. The rule that the law of the place of performance governs fails completely in the case of bilateral contracts in which each party agrees to perform his part of the agreement in a different state.[24] In this class of cases there is no single place of performance which can determine the validity of the contract. The rule fails likewise where a party under an entire and indivisible contract agrees to perform different parts of the contract in different states,[25] or where a contract is to be performed either in one state or in another at the option of the promisor.[26]

3. *View that the personal law should control.*

(1) *The national law of each party.* The view that the common national law of the parties should determine the validity of contracts is supported on principle by the Italian school, which emphasizes the personal quality of law.[27]

(2) *The national law of the debtor.* Zitelmann, the most extreme advocate of the international theory of law, concludes that the national law of the debtor is the competent law to determine the validity of contracts. He says:

"The obligation results from a command to do or not to do, addressed by objective law to the debtor. With respect to questions arising in the law of obligations the competent law from the standpoint of Private International Law is therefore the law which has the power, according to International Law, to command, and we have seen that, except as to torts, it is the debtor's personal statute (*lex patriae*)."[28]

(3) *The law of the debtor's domicil.* As a result of Bar's influence the law of the debtor's domicil has gained considerable favor as the law governing the validity of contracts.

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[24] Courts and writers accepting the law of the place of performance as the governing law abandon their rule in these cases, and apply either the *lex loci* or some other law. German Imperial Court (Feb. 13, 1891) 47 SEUFFERT'S ARCHIV, 3. See also (Apr. 4, 1908) 68 RG 203; (Apr. 19, 1910) 73 RG 379; (Feb. 4, 1913) 81 RG 273; Neumann, *Internationales Privatrecht* (1896) 91; 2 Zitelmann, *Internationales Privatrecht* (1912) 411.

[25] This question has arisen in this country frequently with reference to carriers' contracts, in which the *lex loci contractus* has been commonly substituted for the *lex loci solutionis*. *McDaniel v. Chicago & N. W. Ry.* (1868) 24 Iowa, 412; *Illinois Cent. Ry. v. Beebe* (1898) 174 Ill. 13, 50 N. E. 1019; *Brockway v. American Express Co.* (1898) 171 Mass. 158, 50 N. E. 626; Minor, *op. cit.*, 381.

[26] If the promisor fails to perform in either state the place of performance cannot be determined. Meili, *International Civil and Commercial Law* (Kuhn's transl. 1905) 382; Pillet, (1904) 20 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 157; Roguin, *id.*, 79, note.

[27] Fusinato, *Il principio della sculoa italiana nel diritto privato internazionale* (1884) 33 ARCHIVO GIURIDICO 583-584, 3 Weiss, *Traité de droit international privé* (2d ed. 1912) 70 ff.; 4 *id.* 345, 357.

[28] 2 *Internationales Privatrecht* (1912) 366. Accord: 1 Crome, *Syztem des deutschen bürgerlichen Rechts* (1900) 137.

"This theory . . .," says Bar,[28] "is in principle the correct theory, for this reason, that the general propositions of law in the matter of obligations, the rules which do not give way to the pleasure of the individuals, exist generally in the interest of the debtor. We cannot hold that this protection shall cease on a subject by accident undertaking an obligation in a foreign country, or having to perform one there."

The principal objection to this view is that the assumption that most laws have for their aim the protection of the debtor is unfounded. There is no reason, therefore, why the creditor should submit to the law of the debtor. From a practical viewpoint the rule is open to the same objections as that of the place of performance.

4. *View that the intrinsic validity cannot be determined by a single rule.* Professor Minor contends that the intrinsic validity of contracts should be determined with reference to the law of the place of contracting if it relates to the making of the contract, by the law of the place of performance if it relates to the performance, and by the law of the situs of the consideration if it relates to the consideration.[30] For example, if a contract is made on Sunday in a state under the law of which the *making* of the contract is prohibited, the contract should be regarded as void everywhere.[31] If the illegality relates, on the other hand, to the performance of the contract, the law of the place of performance should control.[32] The validity of an executory consideration is regarded by Professor Minor as governed by principles similar to the above.[33] As regards executed consideration, the effect of the want of consideration is referred by Professor Minor to the law of the place of contracting,[34] and the subsequent failure of the consideration, to the law of the place of performance.[35] The legality of the consideration as affecting the validity of the contract he would determine by the *lex loci considerationis*.[36]

5. *View that the intrinsic validity of a contract should be determined by the law of the state with which the contract has the most real connection.* Westlake is of the opinion that this view is supported by the English courts.[37]

6. *View that the validity of a contract is governed by the law under which the parties contract, the bona fide intention of the parties being the main element in determining what that law is.* Professor Dicey feels that the English decisions sustain this view.[38]

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[28] *Private International Law* (Gillespie's transl. 1892) 543-544.
[30] Minor, *op. cit.*, 401-402.
[31] *Id.*, 403.
[32] *Id.*, 404-405, 418-421.
[33] *Id.*, 421.
[34] *Id.*, 424-425.
[35] *Id.*, 425.
[36] *Id.*, 427-429.
[37] Westlake, *Private International Law* (5th ed. 1912) 305.
[38] Dicey, *op. cit.* note 92, at p. 545-546, 814 ff.

7. *View that the contract should be regarded as invalid unless it satisfies the local law of all states with which it is connected.* This view has been proposed with respect to contracts made by correspondence.[39]

8. *Jitta's view.* Jitta's method for the solution of the problems arising from contracts in their international relations is unique and deserves a brief notice. It can best be stated in his own words:[40]

"From my point of view private international law is not the science of the conflict of laws, but the private law itself considered from the point of view of the requirements of the juridical community of mankind. The solution of the conflicts, the reference to the law of the state of X or to the law of the state of Z, is a means and not an end. The reference furnishes only the lesser half of the solution, i. e., certainty as regards the rule to be applied; but such certainty all rules afford, even the most mechanical ones. In order to gain the other half of the solution, i. e., the harmony between the rule and actual life, it is necessary that the law to be applied be calculated to assure the reasonable order of society, a condition which a mechanical rule, referring to a certain law, does not necessarily fulfil, and which may necessitate the formulation of a juridical rule, independent of the laws which are said to be in conflict. The application of a foreign law should take place only if such application is demanded by a reasonable order of the universal society. . .

"A juridical relation presents itself from a national point of view if it belongs from the standpoint of the legislator or judge to the active local life for which the national law has been established in the first place. . . . In this sphere of action the judge will apply without hesitation the law of his country, for the state whose organ he is considers the application of this law certainly as a requirement of the reasonable order of this society. . .

"States and judges may find themselves face to face with juridical relations belonging to the active local life of a foreign country . . . Respect for the foreign law imposes itself with regard to these juridical relations, except where considerations of a universal public order are opposed. . .

"Finally, a juridical relation may not belong to the active local life of a society but to the active, international or universal life. . . . The judge or state whose organ he is, is under a duty to apply to the international juridical relationship the law belonging to it in the universal active life. . . . Such law (*droit*) may be identical either with the law (*loi*) of a certain country, (that of the country in which the judge is sitting is not excluded if the juridical requirements of the universal social life refer to it) or it may be an independent provision which is derived from a consideration of the local public order and the universal public order."

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[39] Hindenburg, *Revue de droit international et de législation comparée*, 263, 285; Jettel, *Handbuch des internationalen Privat- und Strafrechts* (1893) 108-109; Barazetti, *op. cit.* note 20, at pp. 54-55; 2 Zitelmann, *op. cit.* note 24, at p. 164.

[40] 1 *La substance des obligations dans le droit international privé* (1906) 20-23.

In accordance with the method above set forth, Jitta rejects all general rules like those of the law of the place of contracting, the law of the place of performance, the national law or the law of the domicil as too mechanical. He inquires instead first of all whether the particular relationship in question can be localized. If it belongs to the local sphere of a particular law he applies the law of that state, subject to its rules of public policy. If it does not belong to a local sphere, but to the international sphere, he applies what he calls the international-common rules, and in the absence of such rules, the reasonable principles, limited by the requirements of the universal public order.[41]

The above is a summary of the principal rules or methods by means of which the intrinsic validity of contracts may be determined. Which of these should be adopted by the English and American courts? Some can be eliminated without difficulty. This is true first of all of Jitta's proposed method of solving the problem, which leaves the judge practically without any definite guide to go by. The view also which requires a contract to satisfy the law of all the states with which it is connected cannot be seriously considered. Sound policy suggests that international transactions be sustained as far as possible, instead of being defeated. The *lex patriae* also cannot be approved because it is out of harmony with the fundamental conceptions of Anglo-American law. The law of the domicil of the debtor rests upon the erroneous assumption that most laws are enacted for the benefit of the debtor, and is open to other objections, which make it unacceptable. The choice lies, therefore, between the adoption of the law of the place of contracting or of the law of the place of performance, on the one hand, and the views supported by Minor, Westlake, and Dicey, on the other. As has been shown above, the exclusive application of either the law of the place of contracting or of the law of the place of performance will not solve satisfactorily the different questions arising in connection with the intrinsic validity of contracts. The former rule is unsuitable where the *performance* of the contract is illegal, for in this case the law of the place of performance is clearly the proper rule.[42] For a similar reason the law of the place of performance cannot reasonably

[41] 2 *id.* 506; *The Renovation of International Law* (1919) 138.

[42] Courts and writers appear to agree on this rule. *Western Union Tel. Co. v. Way* (1887) 83 Ala. 542; Minor, *op. cit.*, 418-421; Dicey, *op. cit.*, 553; Harburger and Bar, (1900) 18 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 50.

The same rule should apply on principle if the performance becomes illegal subsequently to the execution of the contract. *Ralli Bros. v. Compania Naviera Sota y Aznar* (1920, C. A.) 25 Times C. C. 227; cf. *Jacobs v. Crédit Lyonnais* (1884) L. R. 12 Q. B. Div. 589; Dicey, *op. cit.*, 554. *Contra: Tweedie Trading Co. v. McDonald* (1902, S. D. N. Y.) 114 Fed. 985; *Richards & Co. v. Wreschner* (1916) 174 App. Div. 484, 156 N. Y. Supp. 1054.

Dicey thinks that the rule would not be applied by the English courts to any contract made in violation, or with a view to the violation, of the revenue laws of any foreign country not forming part of the British Dominions. *Op. cit.*, 553. Anson takes a contrary view. *Contract* (Corbin's ed. 1919) 287-288.

apply where the *execution* of the contract is prohibited by a stringent local policy existing at the place of execution.[43] To this extent it would seem necessary therefore to recognize both the *lex loci contractus* and the *lex loci solutionis.*

The problem is thus narrowed down to the following: What law shall govern the intrinsic validity of contracts in so far as the question does not fall within a stringent local policy existing either at the place of contracting or at the place of performance? It is submitted that neither the *lex loci contractus* nor the *lex loci solutionis* will furnish a satisfactory solution in these cases. The law of the place of performance has the advantage of possessing an internal relationship with the contract, but to apply it gives rise to much uncertainty where the place of performance is not fixed, and the rule is impossible of application in the case of bilateral contracts in which each party agrees to perform in a different state, and in other cases. The *lex loci* is certain and easy of application, but as an absolute rule it does not always bring about desirable results. The case of *Pritchard v. Norton,*[44] referred to in a preceding article, may serve as an illustration. The defendant in that case executed and delivered to the plaintiff a bond of indemnity in the state of New York in which he undertook to indemnify him against all loss arising from his liability as surety upon an appeal bond executed by him on behalf of the defendant as appellant in a suit then pending in Louisiana. The plaintiff, having become liable on the appeal bond, and having paid the amount due, brought an action against the defendant for the recovery of the amount. The defendant set up by way of defense that the bond sued on was without consideration and void under the laws of the state of New York. If the intrinsic validity of contracts is to be governed absolutely by the *lex loci,* the defendant would escape liability under the facts of this case, but it would seem that in all fairness he ought to be held. The defendant would be liable if the *lex loci solutionis* were applied. This rule would render the indemnity bond invalid, however, if the original litigation had been brought in New York and the indemnity bond had been executed in Louisiana, and that would be unfortunate. The Supreme Court of the United States sustained the validity of the indemnity bond in the above case by adopting the intention theory and holding that the parties must have contracted, in view of all the circumstances, with reference to the law of Louisiana.

Professor Minor[45] supports the decision in *Pritchard v. Norton* because, according to him, the situs of the consideration was in Louisiana. The opinion of the Supreme Court of the United States does not suggest, however, that the consideration of a contract may be governed in a case like the one before the court by a separate law, but placed its

[43] As, for example, the policy prohibiting the execution of contracts on Sunday. *Arbuckle v. Reaume, supra* note 22.

[44] (1882) 106 U. S. 124, 1 Sup. Ct. 102.

[45] *Op. cit.,* 426-427.

decision in part on the intention theory and in part upon the fact that Louisiana was the place of performance. Pritchard's antecedent debt was contracted in Louisiana, but the defendant's promise to indemnify him was given in New York. The question was, therefore, whether a past consideration would support the promise, and this question was naturally determined by the court with reference to the law governing the intrinsic validity of the contract itself. Professor Minor's contention, that the validity of a contract as regards the question of consideration must be controlled by the law of the situs of the consideration irrespective of the law of the place where the contract was made or was to be performed, has no support from the cases.[46] English and American courts have not separated the element of consideration from the other elements making up the intrinsic validity of contracts, and have not subjected the contract in that regard to the law of the situs of the consideration, but they have invariably regarded the law governing the contract in general as controlling also with respect to the consideration. Where a note is given in the state of X for a debt incurred in the state of Y, the defence being that the debt is illegal and void, the courts will determine the illegality of the debt of course with reference to the law of the state of Y, which governed the contract out of which the debt arose. The question, however, whether such a debt can support the contract made in the state of X is determined by the law of the latter state.

Cases like the above show the necessity of finding a rule with greater flexibility than that possessed by any of the rules so far considered, excepting Jitta's. If this conclusion is sound, the final choice will lie between the views formulated by Westlake and Dicey and an alternative rule. Westlake's and Dicey's views are both based upon the decisions of the English courts and agree in determining the law under which a contract was made from the surrounding circumstances of the case. The English courts are in the habit of speaking about the law intended by the parties, or the law which the parties ought to be presumed to have intended, in view of the attendant circumstances; the question is, therefore, whether this is merely a way of stating that the law of the state with which the contract is deemed to have the closest connection governs the intrinsic validity of contracts without reference to the actual intention of the parties; or whether their intention is a material factor in the determination of the law. Westlake takes the former view of the English law. The solution is theoretically sound, but from a practical point of view it is open to the objection that the governing law is made to depend upon an appreciation of all the facts of the case, in regard to which different inferences will be drawn by different courts. The validity or invalidity of a contract must under this rule remain uncertain in many cases until the question has been decided by the courts. If a rule is to be found which will produce greater certainty, a choice must be made between the intention

[46] Wharton, *Conflict of Laws* (3rd ed. 1905) 1192-1194.

theory and a rule in the alternative. The theoretical objections to the intention theory have been mentioned above.[47] From the standpoint of practical convenience it has the advantage of being a flexible rule which can take into consideration the needs of the particular case. Unless it is interpreted, however, as supporting any contract which is valid under any law with which the contract has a substantial connection, i. e. as practically equivalent to the alternative rule to be proposed, it is open to the same objection as the rule just discussed. Dicey's statement of the intention theory is subject to this criticism. He maintains that persons who really contract under one law cannot by any device render valid a contract which that law treats as invalid. Where a contract is made in England and has no connection with France, the parties cannot validly stipulate that its intrinsic validity shall be determined by French law, but if the contract is connected with France—if, for example, the place of performance is in that country—the bona fide intention of the parties is, according to Dicey, the chief element in determining whether the contract is an English contract or a French contract. Dicey adds, however:[48]

"If it is clear they meant to contract under one law, e. g. the law of England, no declaration of intention to contract under another law so as to give validity to the contract will avail them anything. But this result follows because in the view of the court, their real intention was to enter into an English contract."

The parties cannot, therefore, directly determine by their choice whether a contract shall be legal or not. All they can do is to determine what is the law under which they in fact contract, and this question must be decided by the courts in the light of all the surrounding circumstances. The necessity of such an examination into and appreciation of the facts makes the ultimate decision of the case necessarily doubtful, and this renders the intention theory in this form open, from the standpoint of certainty, to the same objections as was Westlake's view.

There is in the opinion of the writer but one way to get a rule that is certain and is yet sufficiently elastic to be able to sustain a contract like that in *Pritchard v. Norton,* even if the facts of the latter case were reversed, and that is by regarding contracts as valid if they satisfy the law of any state with which they have a substantial connection. No case has gone quite so far as this. There is a considerable amount of dicta, however, to the effect that there is a presumption that the parties contracted with a view to the law of the state that will sustain the contract.[49] As regards usury the American cases have virtually allowed the parties to contract with reference to the law of any state with which the contract has a substantial connection.[50] Although

[47] *Supra* p. 658.

[48] *Op. cit.,* 820.

[49] See, for example, *Pritchard v. Norton, supra* note 44.

[50] *Miller v. Tiffany* (1863, U. S.) 1 Wall. 298; *Arnold v. Potter* (1867) 22 Iowa, 194; *Scott v. Perlee* (1883) 39 Oh. St. 63.

Anglo-American courts have been disinclined to lay down alternative rules for the solution of any question in the conflict of laws, such a rule was adopted in the case of *In re Hellmann's Will*,[51] in which a German legatee under an English will was permitted to receive his property when he was of age either under English law or under German law. Alternative rules have been adopted also by statute in England with respect to the formal requirements of wills relating to movable property and in this country with respect to the execution of deeds and wills.[52] The adoption of an alternative rule with respect to the intrinsic validity of contracts offers a practical means of solving a most difficult problem in the Conflict of Laws by a rule which is not open to the theoretical objection raised against the intention theory and which is sufficiently certain and elastic to sustain contracts which in fairness should be sustained. It is submitted, therefore

1. That the intrinsic validity of contracts should be recognized if the local[53] law of any state with which the contract has a substantial connection be satisfied.
2. That such contracts be regarded as invalid
   a. if their execution is prohibited by some stringent policy of the place of contracting;
   b. if their performance is illegal under the law of the place of performance.

If the direct recognition of the alternative rule suggested should appear to our courts to be too radical an innovation, the same end can be attained in a less scientific way by a general recognition of the intention theory, as it is understood in the usury cases, with a prima facie presumption that the parties contracted with reference to the law that will sustain the contract.

The same principles should control where the validity or invalidity does not concern the contract as a whole, but only some particular provision.[54]

The above discussion has been confined to the determination of the law that should govern the validity or invalidity of contracts on principle. The conclusion reached must be understood, of course, to be subject to the qualification that a contract, whether valid by its proper law or not, will not be enforced if it is deemed to conflict with the essential public or moral interests of the forum.[55]

(To be concluded in November)

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[51] (1866) L. R. 2 Eq. 363.

[52] (1911) 20 YALE LAW JOURNAL, 432-437.

[53] I. e., to the exclusion of the rules of the conflict of laws of the foreign country. As to "renvoi" see (1910) 10 COL. L. REV. 190, 327; (1918) 27 YALE LAW JOURNAL, 509; (1919) 29 *id.* 214; (1918) 31 HARV. L. REV. 523.

[54] See, for example, *In re Missouri S. S. Co.* (1889) L. R. 42 Ch. Div. 321; *Grand v. Livingston* (1896) 4 App. Div. 589, 38 N. Y. Supp. 490; *Davis v. Aetna Mut. Fire Ins. Co.* (1892) 67 N. H. 218, 34 Atl. 464; Cassation, France, (Dec. 5, 1910), (1911) 7 REVUE DE DROIT INTERNATIONAL PRIVÉ, 395.

[55] Judge Beach maintains that there is no rational basis for such a qualification as between the different states of our own country. *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE LAW JOURNAL, 656.